Filed 3/10/09 In re M.H. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.H., a Person Coming Under the Juvenile Court Law.	B210138 (Los Angeles County Super. Ct. No. CK62992)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.H., Minor and Appellant.	

APPEAL from an order of the Superior Court of the County of Los Angeles, Steven Berman, Referee. Affirmed.

Kimberly A. Knill, under appointment by the Court of Appeal, for Minor and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and Byron G. Shibata, Senior Associate County Counsel, for Respondent.

INTRODUCTION

Minor and appellant M. H. (M. H.) appeals from the juvenile court's order denying her motion under Welfare and Institutions Code section 385[1] for reconsideration of one of the juvenile court's jurisdictional findings, contending that the court committed reversible error when it refused to hear the motion as untimely. Because the record shows, and M. H. concedes, that her motion did not present changed circumstances or new evidence, as required under section 388, we affirm the juvenile court's order denying the motion for reconsideration, regardless of whether the court's reasoning for that denial was erroneous.

FACTUAL AND PROCEDURAL BACKGROUND

In a detention report filed April 11, 2006, the Department of Children and Family Services (DCFS) reported that, based on information provided by the Whittier Police Department, a children's social worker (CSW) interviewed M.H. concerning alleged sexual abuse. M.H., who was 14 years old, told the police that from a young age, her father, R.H. (father) would get into her bed in the middle of the night and touch her breasts and vaginal area. The abuse occurred so frequently she had lost track of how many times it had occurred. The last incident was December 1, 2005, at about 1:30 a.m. when father climbed into her bed and began touching her. M.H. kicked father in the stomach and he left her alone.

M.H. informed the CSW who initially interviewed her that the abuse started when she was six or seven years old. The incidents occurred in the bedroom she shared with father, her mother A.H. (mother), and her four younger siblings. M.H. stated that when she was 11 years old father "began putting his penis inside her area where she goes pee

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

and also in her behind." Father placed his penis "in the area you pee . . . 10 to 15 times" and "in the area where she goes poop . . . more than 20 times."

M.H. informed the CSW that mother had seen father doing something to M.H. when M.H. was 11 or 12 years old and asked M.H. if father had touched her. M.H. replied that she thought father had touched her, but she was uncertain. Mother told M.H. that if father was touching M.H., mother would divorce him and move with the children to Texas. Mother said she would "take care of it," and then M.H. heard mother and father arguing. But the sexual abuse of M. H. by father continued.

DCFS further reported that the police also interviewed M.H.'s 11 year old sister, J.H., who told the police that her father touched her private parts between the legs. According to J.H., it happened a long time ago at home at night in bed. She was asleep and awakened when she felt her father's hand on her "butt," under her pajamas on her skin. When she awakened, father stopped. J.H. reported that on one occasion she had seen father kneeling by M.H.'s bed in the morning, but she could not "see if anything happened."

The police then interviewed M.H.'s nine year old sister, who denied that anyone ever touched her private parts. M.H.'s other two siblings were too young to be interviewed.

When the police interviewed father, he admitted to fondling M.H.'s "entire body," including her vagina and buttocks, on at least three occasions, but denied penetrating her. Father stated that on two occasions while he was fondling M.H., mother walked in and began yelling at him.

Father was arrested and charged in one count with violation of Penal Code section 280.5 and in 10 counts with violation of Penal Code section 288, "with special allegations of multiple victims." At the time of the April 11, 2006, detention report, father was in jail awaiting trial.

DCFS determined that the minors were not at risk in mother's home[2] because father was in jail, and mother confirmed that she was willing and able to protect her children. On January 24, 2006, mother signed a voluntary family maintenance agreement and agreed to receive family preservation services, attend parenting class, and enroll M.H. and J.H. in individual counseling.

DCFS further reported that on February 17, 2006, a CSW met with mother and the children at their home and explained to mother what the family preservation program entailed. Mother stated she could not participate in the program because she was too busy working to meet weekly with an in-home counselor. When the CSW told mother that, at a minimum, M.H. and J.H. should enroll in counseling and mother should attend parenting classes, mother agreed.

On February 28, 2006, a CSW visited mother and the children and was informed that mother had made a March 6 appointment for M.H. and J.H. for individual counseling, but on March 6 the counselor reported that mother and the minors did not keep the appointment. On March 8, 2006, a CSW again visited mother and inquired why mother missed the appointment. Mother replied that she was sick and could not leave the house. On March 17, 2006, a CSW referred M.H. to a mentoring program, sent mother and M.H. a note with information about the program, and advised them that the CSW would visit the family on March 22, 2006. When the CSW arrived at the family's home on March 22, 2006, a paternal uncle told the CSW that mother "took off" with the children about a week ago, but did not provide any further information.

On March 23, 2006, DCFS was informed by the children's respective schools that their last day of attendance was March 13, 2006. A school counselor who spoke to mother about father's arrest for sexual abuse reported that mother "acted like nothing happened."

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[2] The family lived in a converted garage behind a house where the paternal grandparents lived.

On March 23, 2006, a CSW contacted the Whittier police and was informed that father "was facing 15 years to life in prison, but without witnesses he would probably be released from jail." The police also advised that mother's maternal aunt who lived in Texas had contacted the Whittier police because she had not heard from mother and was concerned that something may have happened to her. The maternal aunt filed a missing persons report with the police. A CSW then contacted mother's maternal aunt in Texas and learned that mother and the children had visited her over the holidays, but then returned to California. She did not know the whereabouts of mother and the children, but suspected that the paternal grandparents may have sent them to stay with paternal relatives in either Mexico or Chicago.

Based on the foregoing facts, DCFS filed a section 300 petition on April 11, 2006. At the April 11, 2006 detention hearing, father, who was then in custody, appeared and was represented by counsel. The children were reported "at large with their mother." The juvenile court issued a no bail arrest warrant for mother and protective custody warrants for the children. The juvenile court ordered DCFS to perform a due diligence search for the whereabouts of mother and the children. The juvenile court found a prima facie case for detaining the children from their parents and vesting custody in DCFS. Mother was granted monitored visits once she made contact with DCFS, but father was ordered not to have any contact with the children.

In the May 25, 2006, jurisdiction/disposition report, DCFS repeated the information set forth in the April 11, 2006, detention hearing report and detailed its unsuccessful efforts to locate mother and the children since the time of that earlier report. Following a continuance, the juvenile court conducted the jurisdiction hearing on June 5, 2006. Father appeared represented by counsel, but mother and the children were not present. The juvenile court ordered that the arrest warrant for mother and the protective custody warrants for the children were to remain in full force and effect. DCFS submitted its April 11, 2006, detention report with attachments and its May 22, 2006, P.R.C. report as evidence in support of the petition. After considering the petition, the evidence, and the arguments of counsel, the juvenile court ruled as follows: "[The

Court]: All right. As to the petition, the Court—having read and considered the report requested by the Department, including all of the police reports and statements, the Court does find by a preponderance of the evidence B-1, B-2, B-3, B-4 all as specifically alleged, D-1, D-2, I-1, I-2, J-1, J-2—the petition is sustained by a preponderance of the evidence as to all counts as alleged. [¶] . . . [¶] The minors are persons described by Welfare and Institutions Code section 300." The juvenile court then continued the disposition hearing for 60 days "in hopes the children are found."

At the July 31, 2006, continued hearing, the juvenile court noted that the children's whereabouts were still unknown and continued the matter to October 30, 2006, for a progress report. At the October 30, 2006, hearing, the attorney for the children informed the juvenile court that the District Attorney's office decided not to file a criminal abduction case against mother "because there was no court jurisdiction when the mother took off with the kids . . . ." The juvenile court then observed that father had been released from custody on September 22, 2006. The juvenile court continued the disposition hearing to May 1, 2007.

The juvenile court held interim review hearings on May 1, 2007, October 30, 2007, and April 29, 2008, but there was no useful information about the children's whereabouts provided at those hearings. On June 5, 2008, the juvenile court held a "walk on" hearing at the request of DCFS. The juvenile court noted that the children had been located in Illinois. DCFS explained that they had been taken into custody in Illinois, transported to Los Angeles County on May 30, 2008, and placed in foster care. The juvenile court recalled the arrest warrant for mother and the protective custody warrants for the children. It also noted that father's whereabouts were unknown. The juvenile court ordered that the children were to remain detained in the custody of DCFS. The matter was continued to July 9, 2008, for a disposition hearing.

At the July 15, 2008, disposition hearing, mother appeared and was represented by counsel. Because the three oldest children were not present, the juvenile court continued the disposition hearing to August 13, 2008.

Prior to the August 13 hearing, mother filed a motion under section 385 for reconsideration in which M.H. joined. The motion sought reconsideration of the juvenile court's true finding as to the allegations in paragraph B-3[3] of the petition. According to mother, there was insufficient evidence submitted in support of the petition to support the true finding as to the allegations of paragraph B-3. In particular, mother contested the finding that mother "abducted" the children, arguing that abduction is a crime involving a violation of a court order and that mother did not violate any order because no petition had been filed at the time she allegedly fled the jurisdiction with the children.

At the August 13, 2008, disposition hearing, mother appeared and was represented by counsel. The juvenile court denied the section 385 motion for reconsideration, ruling that "the 385's are not well taken. The time for appeal and time for a motion for reconsideration is long gone. They've been gone for two years. Any appeals mother had or any reconsideration mother had—the Court is not going to allow someone to leave the jurisdiction and then come back two years later and claim anything. I'm not going to entertain the 385's. . . . Those are denied,."

The juvenile court declared the minors dependents of the court, found the children's foster care placement was necessary and appropriate, and denied reunification services for father. Mother was granted monitored visits, and the siblings were granted

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[3] Paragraph B-3 of the petition provides: "On or about 03/13/2006, the children [M.H.], [J.H.], [Ja.H.], [L.H.] and [K.H.]'s mother [A.H.] abducted the children and intentionally secreted the children from DCFS and the District Attorney's office making the children [M.H.] and [J.H.] unavailable to testify as witnesses against the father [R.H.] in the father's Criminal Trial for Lewd and Lascivious Acts against a child fourteen years and under. Such abduction of the children may result in the dismissal charges against the father causing the father to be released from incarceration. Further, the children's mother's abduction of the children endangers the children's physical and emotional health and safety, creates a detrimental home environment and places the children and the child's siblings at risk of physical and emotional harm, damage, danger, sexual abuse and failure to protect."

sibling visitation. M. H. filed a timely notice of appeal, but only from the order denying the section 385 motion for reconsideration.

DISCUSSION

A. Standard of Review

We review the juvenile court's denial of M. H.'s motion for reconsideration for an abuse of discretion. "The determination [on a petition for reconsideration of a prior juvenile court order is] committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; see *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) "While the abuse of discretion standard gives the trial court substantial latitude, '[t]he scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action . . . ."' (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 [255 Cal.Rptr. 704].) 'Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.' (*Ibid.*) With respect to challenged factual findings, a reviewing court will affirm '"if there is any *substantial* evidence to support the trial court's findings," i.e., "if the evidence is reasonable, credible and of solid value . . . ." [Citation.]' (*In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536 [38 Cal.Rptr.3d 484].)" (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 118-119 (*Nickolas F.*).) We may affirm an order if it is correct on any legal ground applicable to the case, whether or not that ground was the legal theory adopted by the trial court, and whether or not it was raised in the trial court. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

B. Reconsideration in Dependency Proceedings

M. H. contends that the trial court abused its discretion when it denied the motion under section 385 to reconsider the jurisdictional finding that mother "abducted" the

children and "secreted" them from DCFS and the District Attorney to prevent them from testifying against father. According to M. H., the trial court erred when it found that the motion was untimely because there is no time limit on the filing of a motion under section 385. In making this contention, M. H. concedes that she did not present the juvenile court with any changed circumstances or new evidence as required under section 388, but asserts that section 385 does not require a showing of changed circumstances or new evidence.[4] M. H. cites to *Nickolas F., supra*, 144 Cal.App.4th 92 in support of this latter assertion.

Assuming, arguendo, that the juvenile court erred by finding the reconsideration motion untimely, the ruling can be based on another legal ground. Contrary to M. H.'s assertion, when a party makes a motion to reconsider a juvenile court order in a dependency proceeding, the requirements of section 388 must be followed, including the requirement of presenting changed circumstances or new evidence. Therefore, regardless of whether the reconsideration motion was timely, it should have been denied based on M. H.'s admitted failure to comply with the evidentiary requirements of section 388.

Our Supreme Court in *In re Marilyn H.* (1993) 5 Cal.4th 295 addressed the issue of whether a party seeking reconsideration under section 385 was required to comply with the evidentiary requirements of section 388. "Section 385 is part of article 12 of the Welfare and Institutions Code. Article 12 pertains to the modification of juvenile court judgments and orders and includes sections 385 through section 390. Section 386 prohibits the modification of any previous order in the absence of prior notice. Section 387 requires that any change of a custody order by placing a minor into a foster home or institution may be made only after a noticed hearing upon a supplemental petition. Section 388 provides for the filing by a parent of a verified petition for modification of a

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[4] DCFS agrees with mother that section 385 does not require a party moving for reconsideration of a juvenile court order for reasons unrelated to changed circumstances or new evidence to comply with the requirements of section 388.

juvenile court order based on changed circumstances. Section 389 provides for the sealing of juvenile court records, and section 390 for the court to dismiss the petition. [¶] Section 385 clearly does not give the juvenile court discretion to modify its previous order in the absence of compliance with the procedural requirements set forth in article 12, which includes section 388's requirement of filing a verified petition for modification based on changed circumstances." (*In re Marilyn H., supra*, 5 Cal.4th at p. 305.)

The Court of Appeal decision in *Nickolas F., supra,* 144 Cal.App.4th 92 upon which M. H. relies does not alter or otherwise conflict with the holding in *In re Marilyn H., supra*, 5 Cal.4th 295. Unlike this case, which involves a motion by *a party*[5] for reconsideration, *Nickolas F.* involved the reconsideration of a prior order by *the juvenile court sua sponte*. The issue in that case was whether a juvenile court was required to comply with the requirements of section 388 when reconsidering sua sponte one of its own prior orders. In concluding that a juvenile court could reconsider sua sponte under section 385 one of its own prior orders without complying with the evidentiary requirements of section 388, the court in *Nickolas F.* explained: "When the juvenile court contemplates modifying a previous order, either pursuant to a request by a party or on the court's own motion, section 385 does not impose any particular procedural requirement described in Welfare and Institutions Code, article 12. Rather, as indicated by the phrase '*subject to such procedural requirements* as are imposed by this article,' the type of procedural mechanism required by section 385 depends on the type of modification sought. (§ 385, italics added.) The use of the word 'such' means that the procedural requirement is 'definite but not specified.' (Random House Dict. (2d ed. 1993) p. 18199, col. 3; see also Black's Law Dict. (8th ed. 2004) p. 1473, col. 2 ['[o]f this or that kind'].) By its terms, section 388 applies only when *a party* petitions the court for modification based on new evidence or changed circumstances. Nothing in [*In re*]

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5 As noted, mother filed the section 385 motion and M. H. joined in that motion.

Marilyn H., supra, [5 Cal.4th 295] or in the plain language of section 385 indicates that the Legislature intended to limit the juvenile court's authority to reconsider its previous orders to circumstances in which a party has filed a petition pursuant to section 388." (*Nikolas F., supra*, 144 Cal.App.4th at p. 113-114.)

Accordingly, the court in *Nickolas F., supra,* 144 Cal.App.4th 92 concluded that "the juvenile court has the authority pursuant to section 385 to change, modify or set aside its prior orders sua sponte. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1297 [13 Cal.Rptr.3d 786, 90 P.3d 746] ['Section 388 allows any parent to petition the juvenile court and section 385 allows the court *on its own motion* to change, modify, or set aside any order previously made by the court' (italics added)]; *In re Hirenia C.* (1993) 18 Cal.App.4th 504, 512 [22 Cal. Rptr. 2d 443] ['section 385 gives the juvenile court continuing jurisdiction to modify its dependency orders sua sponte'].) Under this section, the juvenile court may modify an order that contains a clerical error, but may also reconsider the substance of a previous order the court considers to have been erroneously, inadvertently or improvidently granted. (Rule 1430(f); see *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450 [63 Cal.Rptr.2d 513] [juvenile court had authority to correct its own erroneous ruling].) In circumstances such as are presented in this case, section 385 is the procedural mechanism by which the juvenile court may modify a previous order, sua sponte, in dependency proceedings." (*Nickolas F., supra,* 144 Cal.App.4th at p. 116.)

Here, there is no indication in the record that the juvenile court was contemplating any modification to its previous jurisdictional findings, either sua sponte or on the informal suggestion of a party. To the contrary, given the juvenile court's comments at the hearing on the motion, it is clear the court had no intention of modifying its jurisdictional findings at the disposition hearing. The issue of reconsideration was raised solely by mother's formal noticed motion. That motion did not contain the elements necessary for reconsideration based on the formal request of a party. Therefore, the juvenile court's ruling denying that noticed motion for reconsideration was correct as a matter of law based on the admitted noncompliance with section 388, regardless of whether the court's timeliness rationale was correct. Because on appeal we review the

correctness of a juvenile court's ruling, not its reasoning (*Woods v. Union Pacific Railroad Company* (2008) 162 Cal.App.4th 571, 576), we conclude that the juvenile court did not abuse its discretion in denying M. H.'s motion to reconsider.

C. Purported Appeal from Jurisdictional Order

M.H. argues that even if we conclude that the juvenile court properly denied her motion for reconsideration, we should nevertheless consider her appeal as also taken from the juvenile court's June 5, 2006, true finding on Count b-3,[6] and review the sufficiency of the evidence in support of that finding. According to M.H., although the juvenile court made that true finding on June 5, 2006, the court then continued the disposition hearing due to the absence of mother and the minors. Therefore, M.H. argues, her first opportunity to appeal from the juvenile court's jurisdictional finding was after the juvenile court entered the dispositional order on August 13, 2008, citing *In re Tracy Z.* (1991) 195 Cal.App.3d 107, 112 and *In re Melanda P.* (1997) 56 Cal.App.4th 1143, 1150.

Assuming M.H. is correct, and the time for appeal from the June 5, 2006, jurisdictional order ran from the August 13, 2008, dispositional order, she nevertheless failed to perfect her appeal from that jurisdictional order. "If an order is appealable, an aggrieved party must file a timely notice of appeal from the order to obtain appellate review. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 [269 Cal.Rptr. 228].) A notice of appeal from a judgment alone does not encompass other judgments and separately appealable orders: '"The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken."' (*In re Marriage of Weiss* (1996) 42

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6 See footnote 3, *ante*.

Cal.App.4th 106, 119 [49 Cal.Rptr.2d 339].)" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.)

"The notice of appeal is sufficient 'if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule [8:821(a)(2)].) '"[W]here several judgments and/or orders occurring close in time are separately appealable (e.g., judgment and order awarding attorney fees), each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal."' (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43 [99 Cal.Rptr.2d 366], quoting Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1998) ¶ 3:119.1, p. 3-34 (rev. # 1, 1997), italics omitted.)" (*Sole Energy Co. v. Petrominerals Corp*, *supra*, 128 Cal.App.4th at p. 239.)

Here, M.H.'s August 14, 2008, notice of appeal specified an appeal from only one order—the order denying her section 385 motion. That notice failed to specify that she was also appealing from the jurisdictional findings made on June 5, 2006, notwithstanding that paragraph 6(a) of her form notice of appeal contained a box which, if checked, would have provided for "review of section 300 jurisdictional findings." Instead of checking that box, however, M.H. checked only the box for paragraph 6(d), specifying an appeal from "[o]ther appealable orders relating to dependency proceedings," next to which she specified in hand writing, "Denial of [section] 385 motion." Thus, M.H. timely appealed only from the order denying her motion for reconsideration under section 385. Because M.H. did not file a timely notice of appeal from the juvenile court's jurisdictional order, we have no power to review on appeal the sufficiency of the evidence in support of that order.

DISPOSITION

The order of the juvenile court denying M. H.'s motion for reconsideration under section 385 is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.